THE DECALOGUE JOURNAL

A PUBLICATION OF THE DECALOGUE SOCIETY OF LAWYERS

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Salute to the Dissenters

There are times when the dissents have the better of the argument. It was such a time when the Conference of State Chief Justices voted 36 to 8, with two abstentions and three absentees, to criticize the United States Supreme Court as lacking in judicial self-restraint and invading the field of legislation.

Whether they realize it or not, the 36 state chief justices who adopted the report of a committee of 10 headed by Chief Justice Frederick W. Brune of Maryland have given assistance to all those reactionary forces which are trying hard to set the United States far back on the road to equal rights. For at the bottom of this current anti-Supreme court agitation is the dislike of the Dixiecrats for the 1954 decision on school segregation.

Chief Justice Charles A. Jones of Pennsylvania, to his credit, did not hesitate to point this out to his colleagues, while Chief Justice Joseph Weintraub of New Jersey, supporting that view, said it was "unfortunate that the prestige of the Conference of Chief Justices should be placed behind so serious an indictment." And Rhode Island's chief justice, Francis B. Condon, indicated the way of self-restraint to the state jurists when he observed that their organization was "consultative—not an organization to sit in judgment on the highest court in the land."

It is silly to blame the Supreme Court for the increase in power and authority in the federal government, as the report did. That is a trend which the states, the White House and Congress all have been parties to. It was no business of the Supreme Court either to delay or accelerate, and the record will show that the high bench in Washington has contributed far less than those local politicians and business men who have run repeatedly to Capitol Hill hat in hand.

The Conference of State Chief Justices has done its standing no good by throwing in with this emotional campaign against the Supreme court's desegregation decision. With its dissenters we regret that it allowed itself to be used to further that ugly purpose. Particularly we regret that the chief justices from Missouri and Illinois did not distinguish themselves by standing with the dissenters.

COURTESY, *St. Louis Post-Dispatch.*

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IN THIS ISSUE

The Editor will be glad to receive contributions of articles of modest length, from members of The Decalogue Society of Lawyers only, upon subjects of interest to the profession. Communications should be addressed to the Editor, Benjamin Weintroub, 179 West Washington Street, Chicago 2, Illinois.

Decalogue Annual Election and Installation of Officers on June 10th.

The Decalogue 1959-1960 annual election and installation of officers will be held the evening of June 10th at a dinner at 6 P.M. in the quarters of The Chicago Bar Association, 29 So. La Salle Street. The ceremonies of installation will feature a suitable program of entertainment and an address by a prominent member of the legal profession whose name will be announced shortly. Members, their wives and friends are urgently invited to attend.

Society Sponsors Symposium on Religion in Public Schools

May 1st—Law Day, celebrated by the legal profession in the United States as an expression of its appreciation of and solidarity with our Constitution and Bill of Rights, will be marked by The Decalogue Society with a symposium on "Religion in the Public Schools."

The meeting will be held in the Covenant Club, at a luncheon, on Friday May 1st. Clergymen, civic leaders, and members of the legal profession will participate.

Our Society, as previously announced, is sponsoring a nation-wide contest on the "Constitution and Religion in Public Schools." A number of lawyers and law students have already submitted manuscripts. Substantial prizes in money will be distributed to the winners.

John M. Weiner is chairman of The Decalogue Forum committee, under whose auspices the symposium will be held.

MEYER WEINBERG, AUTHOR

The Bobbs-Merrill Publishing Company of Indianapolis announces the publication of a 1959 Cumulative Supplement to *Keezer On The Law Of Marriage And Divorce*, now in its third edition, by member Meyer Weinberg of the Illinois Bar. The Supplement includes the years 1950 through 1957, involves some 8,000 cases, and covers all legislative enactments of all states in the Union and territories. Mr. Weinberg is now preparing a fourth edition of this volume. He is also the author of the popular *Illinois Divorce, Separate Maintenance and Annulment*, (with forms).

SAVE THIS DATE!

Chevy Chase Country Club on July 16th will again be the scene of The Decalogue all day outing. Details will follow in the next issue of The Journal. L. Louis Karton is chairman of the Outing committee.

NINETEEN FIFTY-EIGHT DECALOGUE MERIT AWARD

The Decalogue Society of Lawyers twenty-fourth annual merit award dinner at the Palmer House the evening of February 28th was an outstanding success in all of its aspects. Hundreds of members, their wives and friends came to help pay tribute to The Decalogue selectee for the 1958 award, Federal Judge Simon E. Sobeloff, of Baltimore, Maryland, Chief Judge United States Court of Appeals, Fourth Circuit, the featured speaker for the occasion. Congressman Sidney R. Yates, of the Ninth Congressional District of Illinois and a member of our Society, made the presentation of the award. John E. Melaniphy, Corporation Counsel of Chicago, spoke on behalf of Mayor Richard J. Daley who was unable to attend. Representatives of the following bar associations were at the dais: Chicago Bar Association; Illinois State Bar Association; Women's Bar Association of Illinois; Lithuanian-American Lawyers' Association; Bohemian Lawyers' Association of Chicago; Nordic Law Club of Chicago; The Advocates Society; The Hellenic Bar Association of Illinois; The Catholic Lawyers Guild of Chicago; Lutheran Bar Association; Cook County Bar Association; Justinian Society of Lawyers.

President Alec E. Weinrob was chairman of the affair. First vice-president Meyer Weinberg was chairman of the arrangements committee. Past president Elmer Gertz was vice-chairman.

Welcome:
—PRESIDENT WEINROB

For us this occasion has double significance: we are paying tribute to a distinguished and outstanding member of the legal profession, and also, we mark the dawn of the silver anniversary year of the founding of our Society.

In 1934 this country, and, indeed, the world, was in the depths of an economic depression. One of its consequences was political and social insecurity. The Three Horsemen of the Apocalypse, Naziism, Communism, and Fascism were riding rough-shod over the lives and liberties of people throughout the world. The lights were being dimmed, and the virus of the philosophy of the racial superiority was being spread in this country through the formation of the Bund, the Silvershirts, the Blue Shirts, and similar organizations with a variety of colored haberdashery. A group of lawyers in Chicago organized *this* society to combat these and other doctrines detrimental not only to the American way of life but to all standards of human decency and behavior.

I don't mean to imply that we were alone in our effort in combatting the social cancer of racial prejudice and bigotry. There were citizens of other ethnic groups, professions and pursuits who did exactly what we tried to achieve and, perhaps, more. Many of you who have attended our former Merit Award dinners know that we paid tribute to a Catholic Bishop, a Protestant newspaper publisher, a Negro scientist, a Jewish Rabbi—men in all walks of life. Last year we honored a lady, a great lady, Mrs. Eleanor Roosevelt.

We paid homage to these people because they represented to us the Platonic idea of the "good life," and the Judaic-Christian standard of ethics as propounded by the prophets. They unfurled and held high the standards of virtue and decency around which the common man could assemble and give battle to the forces of bigotry and darkness. Still, the battle is far from over and far from won. The reason The Decalogue Society of Lawyers has these Merit Award Dinners, and I hope we will continue to have them, is because we subscribe to Jefferson's pronouncement that "Eternal vigilance is the price of Liberty."

As long as we have people who are ill-housed, ill-clothed and ill-fed, as long as we have people who are discriminated against in their quest for an equal opportunity, for the education of their children, because of their race, color or creed, so long must we be alert to the evils that these conditions impose upon their lives.

I am especially proud of the part that lawyers have played in preserving and defending the constitutional and natural rights and liberties of the people. In the school segregation cases, they have shown that the maintenance of the status quo of an individual or a group is often not enough, either legally or morally, and it becomes our sacred duty to change such status.

It is symbolic that on this, the 25th Anniversary of the founding of the Decalogue Society of Lawyers, we honor a man who has made a valiant fight in his private and public life for the same concepts that we and other men and women of good will have fought for from time immemorial.

Judge Sobeloff, on behalf our our Society and the men and women here assembled, I greet you and thank you for taking time out of your busy and useful life to come here and honor us by your presence. You, and the distinguished roster of people who preceded you, serve as an inspiration

to us that Life is worth living. To quote the poet Alfred Austin:

Yes, so long as there is wrong to right
So long as faith with freedom reigns
And loyal hope survives;
And Gracious charity remains
To leaven lowly lives;
While there is one untrodden tract
For intellect or will,
And men are free to act and think,
Life is worth living still.

Presentation:

—CONGRESSMAN SIDNEY R. YATES

Judge Sobeloff has had a long and distinguished career in all branches of the Government. He began in the Congress of the United States as a page boy in the House of Representatives, and he recalls clearly the historic struggle which took place when the insurgents led by Senator George W. Norris deposed Speaker Joe Cannon. On the third night of the struggle, exhausted by lack of sleep and emotional tension, young Simon lay down and slept in one of the alcoves in the north entrance of the House chamber. I wonder whether it was this episode, of experiencing personally the tough life which members of Congress have—of the long hours of work they put in and the emotional tensions they undergo that made him decide to become a judge rather than a congressman.

From 1919 to 1931 he served as United States Attorney for Maryland. There was no worthy activity that did not capture his attention. He campaigned for unemployment insurance, he fought for public housing, he resisted fiercely the efforts of customs officials to impound such books as Aristophones "Lysistrata." He even appeared before the Judiciary Committee of the United States Senate in support of a Federal Anti-Lynching law. In 1943 Mayor Theodore R. McKeldin appointed him City Solicitor of Baltimore and when McKeldin was succeeded by a Democrat in 1947, Judge Sobeloff was still retained as special counsel. May I say, Judge, that Democrats always have the ability to recognize talent, even in members of the opposite party.

I should mention parenthetically that when he was a young lawyer in the Corporation Counsel's office in Baltimore, Judge Sobeloff was requested to represent a street-cleaner who was having alimony difficulties with his wife. The wife had filed a petition to obtain an increase in alimony upon the ground that her husband was a very gifted man and could, without doubt, obtain a much more remunerative position than that of street-cleaner. She told the judge that the only reason her husband insisted upon keeping the job as street-cleaner was to deprive her of increased alimony. Upon hearing this, the judge leaned forward and gently reproved her, saying: "But Madam, have you not overlooked the glamour of public service?"

All during his career, as an advocate in private practice, as an official of the Government and as a Judge, our honored guest distinguished himself. When he left the United States Attorney's office in 1944, the Baltimore Sun commented editorially: "He did not forget that the District Attorney is an official of the court, whose duty it is to see that justice is done rather than to secure convictions, just or unjust."

In 1952 the Judge became Chief Justice of the Court of Appeals of the State of Maryland where his decisions marked him as one of the outstanding jurists in the country. He left this post in February, 1954, to be sworn in as Solicitor General of the United States. In resuming his role as an advocate, he demonstrated that he had lost none of his earlier skill as a trial lawyer and rarely has the government been represented as well in its cases as during the time he was its Solicitor General. One case stands out in my mind as showing his courage and devotion to principle. It was the case of Peters vs. Hobby, which was a suit brought by Professor John Peters of the Yale University Medical School to recover his job as a Federal Health Consultant, from which he had been discharged by a loyalty board. Some of the testimony before the Loyalty Board had been offered by witnesses whose identity was never made known to Peters. The defendant claimed the right to be confronted by his accusers. The Government prevailed in the lower courts and the case was appealed. When the matter was brought to the attention of Solicitor General Sobeloff, he proposed that Peters be restored to his job on the grounds that he was entitled to know his accusers, unless the necessity for concealment had been approved before an impartial board on the basis of the highest security reasons. The Department of Justice, however, decided to maintain its position and rejected Mr. Sobeloff's argument. Whereupon he refused to sign the Government's brief and it went before the Supreme Court without the customary signature of the Solicitor General. The Supreme Court found for Peters. Once again, Judge Sobeloff had been sustained in his loyalty to the cause of fundamental justice and in his refusal to handle a case which he thought was wrong.

In 1955 President Eisenhower appointed him to be Judge of the Circuit Court of Appeals of the 4th Circuit, the position which he now holds. It was at this time that the forces opposing the Supreme Court decisions on school desegregation ral-

lied to block confirmation of his appointment because as Solicitor General he had made a recommendation to the Supreme Court as to the manner in which its decrees in the school desegregation should be carried out. Why were they opposed to such a highly qualified appointee? They said they were opposed to his philosophy.

Those who opposed his confirmation knew that the courts are no less battlefields for social progress than the Executive and Legislative branches of our government. They know that the way to change the Court's decisions is to change the men who make the decisions. The country moves in no small measure to the thinking of the men on the bench, and the most carefully drawn legislation has its gaps and uncertainties.

There are judges like old Justice McReynolds who in 1935 solemnly declared when the court refused to invalidate a New Deal measure: "The Constitution is dead."

And then there are judges like Justice Hugo Black who fills his vessels in accordance with this expressed belief:

"Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak and outnumbered, or because they are non-conforming victims of prejudice and public excitement."

The opposition to Judge Sobeloff's confirmation was essentially a testimonial to him. It was a tribute to his profound insight into social problems; his keen appreciation for our great Constitutional traditions; his unusual knowledge of our history and for the meaning of freedom; his deep faith in our democratic institutions and in their power to cope with and provide for any contingency, however difficult or novel.

Fortunately at the time when he was beset by opposition to his appointment, there sprang to his defense hosts of the finest lawyers in the State of Maryland, outstanding judges, senators, all urging his confirmation. The Senate voted overwhelmingly in his favor.

In presenting the President's medal to our honored guest in 1955, Philip M. Klutznick of B'nai B'rith said this:

We grasp fervently as a conscious commitment our prayer and hope that men like you, unsullied and incorruptible, honest and forthright and capable, shall continue to occupy the positions of power and of judgment in the Nation we love so well, men who will no less be committed in their responsibilities as public servants to the realization that all government and all people will find salvation through the religious ideal that is America and the realization at the earliest time of the dignity of man made in the image of God.

JUDGE SIMON E. SOBELOFF: —Response

I am convinced that when you chose the name by which to call your Society you did not act through ignorance or inadvertance, for it so fittingly indicates the interest of Jewish lawyers in the law, and not merely law as a collection of technical rules, but law in its broadest scope. I have in mind law in the sense that our fathers reverently spoke of Torah, which is not judicial primarily, but moral; for in truth, no matter what legal philosophy we embrace there is an intimate relation between law and morals. They are not identical, but a system of law unrelated to morality is inconceivable, particularly in a democracy. The harmony between our religious ideals and those of government has often been pointed out, for the foundation of democracy is moral, even as its structure is political. The political theory expressed by Jefferson's phrase about the inalienable rights of man and what the religionist calls the dignity of the human personality are one and the same thing. Stripped of technicalities, is it not the underlying objective of government to bring order and fair dealings into society; to define and assure to each his rights; to restrain the strong from aggressions against the weak; to prevent violence, exploitation and deceit; to establish a modicum of decency in the relationships among individual men, and among groups and collectives of human beings? These certainly are also the goals of ethical religion.

With your indulgence, I ask you to consider some thoughts about the American Jewish community. Through the years we have added our share to the nation's creative heritage, participating fully in its trials and triumphs, always striving toward a better orchestration of its democracy. Our contribution to the pluralistic vigor of our free country has been the more significant because we have been at liberty to live and labor creatively both as Americans and Jews, not negating our own distinguishing attributes while conscious of the essential unity between us and the general population. Anyone who thinks that this involves a disharmony puts a mean interpretation upon American freedom.

There are free Jews in this country. There are a few who are not so free, despite what the Constitution and laws say and even when their neighbors do nothing to impair their freedom. They are not free because they fail to understand the fullness and richness of Americanism and because they misunderstand themselves.

No Jew is really secure if he finds it necessary to look over his shoulder, as it were, to see if his Jewishness is showing; if he has to say to himself,

"Now, you are being too Jewish." He is truly secure only if he feels entirely free in regard to his Jewishness and takes it in his stride, with no more embarrassment or trepidation that a Methodist feels, or a Quaker. A man is free inwardly as well as outwardly when he feels that he can be himself without fear or apology and without need to deny his identity or to camouflage it or distort it to please his neighbors—when he is not tense but breathes free, or, to use a phrase from the poet Robert Frost, when he feels "loose in his heart."

The magnificent offer of America to its minority groups is that they are free to be what they are; that a man need not fear being too Norwegian or too French, or too Baptist or too Catholic. By the same token it is not America, but an inner malady, a derangement within a man that persistently raises the question, "Are you being too Jewish?"

Most Jews, however, are not obsessed by such sickly self-deprecation. They find satisfactions in their group life and group associations. They are proud of their past, which has been magnificent and they wish to create a future no less praiseworthy.

Consider the experience of our American Jewish community over these last 40 years. Think how much of our effort and resources necessarily have been concentrated upon events abroad. The cries of the persecuted; their efforts to escape; plans to rescue these victims and heal their wounds; resettling them in the only place that welcomes them —gallant little Israel—. There have been many chapters like these, and now we hear the call of those being forced out of Rumania. These things cannot be matters of indifference to us. We will not avert our eyes and shut our ears and our hearts and pretend not to see and hear.

Therefore, no matter how Israel is regarded—whether as prophetic fulfillment or only a notable military victory against odds; whether as spiritual homeland for the enactment of new chapters of greatness or merely as a necessary philanthropic endeavor; whether as the working of Providence or the work of statesmen; it commands our solicitude and merits our support. I commend your Society for its significant role in such endeavors. You have behaved as one might expect of lawyers who are thoughtful and informed leaders in the Jewish community.

Standing in the presence of a group of Jewish lawyers, I would like to submit a thought that I think may interest you. I wish that our profession generally, and Jewish lawyers in particular, had a deeper knowledge of the Jewish influence on western law. We are likely to think of the Talmudists as conducting their discussions in a civilization very far removed, not only in time, but in spirit, from ours. Yet, we find them dealing with legal problems arising in some of their crowded urban communities which now engage the attention of our modern cities. We may think that co-operative apartment ventures are the creation of twentieth century promoters in Chicago or New York. However, we find in the Talmud a concern with the ownership of upper stories of houses, dissociated from the ownership of the land and of the lower stories. The law of party-walls is worked out by them in detail. Modern lawyers are apt to think that the right of privacy was first discovered by a bright young law student at Harvard Law School, Louis D. Brandeis, in the celebrated law review article he wrote about 75 years ago. Yet, protection of the right of privacy is a subject considered in the Talmud. Minute and perplexing details of insurance law are there dealt with. They even record a case about laborers who went on strike; the solution is not without merit. Akin to the processes of a modern American statute, the Taft-Hartley Act, they called for a cooling-off period; they said a strike is valid provided it is called only after consulting learned men. This must be a prophetic reference to the N.L.R.B. In the Middle Ages they were considering the necessity of curbing unfair competition in business—something we are grappling with today in our legislatures, before regulatory bodies, and in the courts.

Not everything we need to know began with Lord Coke or Lord Mansfield. The roots of many of our juridical concepts extend back to Jewish sources, and it is a great pity that these remain for most Jewish lawyers a closed book. A study of such ideas is certainly not less pertinent to our daily lives, and would probably be more interesting professionally, than the dreary grind our law students are subjected to about livery of siezin, foeffments, primogeniture and obscure and forgotten features of feudal law.

What I am speaking about is not a religious concern primarily. It pertains to the mind and spirit. It has to do with our tradition of learning, for we live in a double culture—that which we inherited from our fathers and that which we share with fellow Americans. The two do not conflict; they supplement and enrich one another. Anything that enhances knowledge of the past, that broadens our horizon and deepens our reverence, makes us better both as Jews and Americans. It also improves us in our profession, for it is a mistake to think that all the erudition fit for a lawyer is to be found nowhere except in those buckram bound books put out by the West Publishing Company. They have no such monopoly, I assure you.

I have just said that the kind of scholarly enterprise I am proposing is not primarily a religious concern; yet in a sense it is that too, for in our tradition, as Rabbi Morris A. Gutstein who sits here will confirm, study is recognized as a mode of worship.

We have a great treasure house of learning that has particular relevancy for us as lawyers.

I mention this not as fine sentiment, merely to titilate you. I harbor a more aggressive intention; I want to propose that you do something that I think you can do. Why would it not be a worthwhile undertaking for The Decalogue Society to establish a program of scholarly research to trace the Jewish influences upon the development of the legal systems of the Western world? How edifying it would be for all of us to receive from time to time the published product of such research! And, I may add, the spread of such knowledge of our worthwhile contribution to civilization will do more to enhance inter-group understanding and respect than many ardently eloquent, but abstract, expressions at inter-denominational good will meetings.

Mr. Edward Levi, Dean of the University of Chicago Law School could, I am certain, give you valuable suggestions and guidance in organizing such a project. Chicago would be an excellent center for such studies—or you might consider another law school, or perhaps, if you prefer, Brandeis University. I hope that you will look into the feasibility of this suggestion.

May I in conclusion say something of a more general nature? I wish to state my belief that the several forms of legal and judicial activity are essentially related, whether performed at the trial table, in an office, or on the bench. At all stages, we are jointly engaged in an adventure far more complicated than merely construing technical provisions of statutes or other documents. We are not engaged in mere word-playing. We deal with people, and the relations between people, and the pursuit of justice is the heart of the enterprise. That is why it is so important to understand what is meant when it is said that this is a government of laws and not of men. True, the judge is under the law; he is not free from its commands, and he operates within its limitations. But no legal structure can be erected that does not depend upon the integrity, the insights, and understanding of men.

Increasingly attention is concentrated today on science. This is understandable, for in the swift unravelling of the mysteries of the universe, science is making many profound alterations in our world; and who is so wise that he can predict the future? Yet science has not changed nor is it likely to change the essential nature of man himself, or to remove the need for stability and justice in human relations. Whatever else may change, this will endure among the loftiest concerns of mankind.

Each of us, therefore, acting in his particular sphere, has the obligation, within the framework of the law's command, to ascertain and give effect to the claims of justice between a man and his neighbor, and between the citizen and his government. Being human, we cannot hope for a perfect score, but that is the ideal toward which together we must strive with undeviating purpose.

I conclude, as I began, with heartfelt thanks to The Decalogue Society for this award. This evening will live in my memory as long as I shall live, and I will endeavor faithfully to vindicate your confidence.

Decalogue Great Books Course

The administrators and leaders of The Decalogue Society Great Books Course note with great satisfaction the completion of six consecutive years of service to The Decalogue membership in this important phase of our Society's cultural endeavors.

Throughout the years of the existence of this course —bi-weekly discussion meetings in the offices of our Society—members and their friends have renewed their acquaintance with poets and authors from Homer to Melville, from the epic poetry of the Iliad and the Odyssey to the heroic adventures of Captain Ahab and his crew; with playwrights from Aristophanes and Aeschylus to Shakespeare and Shaw, from The Birds and Oedipus Rex through most of the Shakespearean plays to Joan of Arc; from Socrates, Plato, and Aristotle through Augustine and Aquinas to Rousseau, Locke, Spinoza, Pascal, Kant and Hume, from the earliest Greek philosophers who laid the groundwork for all philosophic thinking through the middle ages to the modern philosophies of this age; from Euclid to Einstein, from geometry to the theory of relativity and atomic energy; from James to Freud. From the simplest examination of human behavior to the complex theories of psychoanalysis.

Announcements of the beginning of the seventh year course will be published shortly in The Journal. No educational prerequisites are required to join the group. Your non-participation in prior courses is no bar for joining up at anytime. For further information you are urged to call Mr. Alec E. Weinrob or Mr. Oscar M. Nudelman, conductors of The Decalogue Discussion Groups since the beginning of these courses, at FRanklin 2-7266, or FRanklin 2-1266.

LAUD DECALOGUE 1958 CHOICE

Below are excerpts from letters that have reached the president of our Society up to the time this issue went to press. More comments, it is expected, will be published in a later issue.

. . . You have bestowed upon Judge Simon E. Sobeloff an honor which he richly deserves.

Benjamin S. Adamowski
States Attorney of Cook County

* * *

. . . The Judge has rendered distinguished public service over a long period of years, and I trust will continue to do so for many more to come.

Justice Hugo L. Black
United States Supreme Court

* * *

. . . As a public servant who has served both as advocate and jurist he has distinguished himself with an outstanding record. We are all mindful that a great portion of this record is still unwritten and I join his legion of friends in wishing him well as he continues this dedicated service.

Justice Tom C. Clark
United States Supreme Court

* * *

. . . Judge Sobeloff's contributions in public affairs as a state and federal judge, and as a former Solicitor General of the United States, have been of high distinction, and make him worthy to join the ranks of the other distinguished recipients of your Award.

John M. Harlan
Justice of the United States Supreme Court

* * *

. . . Simon Sobeloff is an outstanding lawyer of the United States. Baltimore is a better City because of service he has given it; Maryland is a better State because he was so close to my side in the early years of my administration in the Governorship; the nation has benefitted magnificently from his work and advice as Solicitor General of the United States; and the cause of justice has benefitted tremendously by his knowledge and vision as Chief Judge of the Maryland Court of Appeals and as a Judge, in these years of transition, with the United States Court of Appeals for the Fourth Circuit.

Theodore R. McKeldin

. . . He is not only an outstanding American and a great civic leader, but a jurist of great vision and legal scholarship.

Barnet Hodes

* * *

. . . This is a very fitting recognition of the outstanding service which Chief Judge Sobeloff has rendered to his country.

Herbert H. Lehman

* * *

. . . Chief Judge Sobeloff is an outstanding jurist with an excellent record on the bench and is a prominent, militant and constructive Jew, and I compliment the Society on its selection.

Judge Julius H. Miner
United States District Court

* * *

. . . Please congratulate Judge Sobeloff for me and tell him that I am very sorry I cannot be present.

Harry S. Truman

SAMUEL ALLEN HONORED

Past president Samuel Allen was honored in a community wide celebration for his services to the Humboldt Boulevard Temple and to many civic and professional causes at a banquet on March 15th, in the Temple vestry at 1908 Humboldt Boulevard.

Judge Harry G. Hershenson was the featured speaker for the occasion. Together with other notables at the affair he recalled the many years of service rendered by Mr. Allen as First Assistant City Attorney and, later, as head of the Torts Division, City of Chicago, where he served for ten years. Judge Hershenson noted that upon Mr. Allen's retirement from that office, the City Council of Chicago passed a resolution expressing its appreciation for his work.

Mr. Allen served as president of our Society during 1949-1950. He was the recipient of the Society's inter-organization award for distinguished service in 1952. Long active in the Ramah Lodge, B'nai B'rith, he is currently a member of its executive committee. A past president of the Humboldt Boulevard Temple, he is now chairman of its Board.

Murray J. Peiman is Rabbi of the Humboldt Boulevard Temple. Harry Robin, president of the Temple, was chairman of the event.

SAUL A. EPTON REAPPOINTED

Member of our Board of Managers, Saul A. Epton, was reappointed by Governor William G. Stratton to the Civil Service Commission for a second six year term. Illinois Senate has yet to act to confirm this appointment at the present session of the legislature.

Mr. Epton, a close personal friend and aid of the Governor, was among the first to receive the Governor's appointment to this high office.

FEDERAL TAX REFUND SUITS AND PARTIAL PAYMENTS

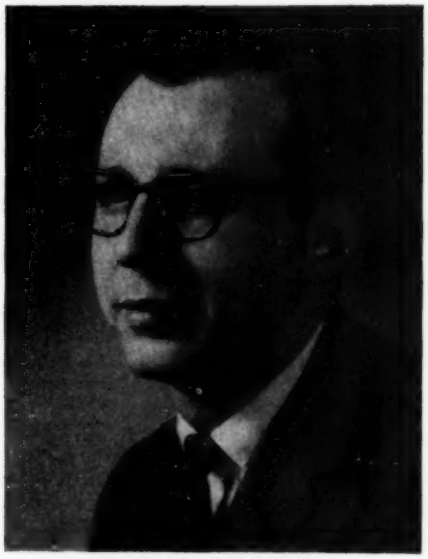
By DONALD S. LOWITZ

Member Donald S. Lowitz did his undergraduate work at Northwestern University School of Commerce. He graduated from Northwestern University Law School in 1952 where he was elected to the Order of Coif. While in law school he was a Note Editor of the LAW REVIEW *and wrote several articles on federal taxation. For the past four and one-half years he was the Assistant U. S. Attorney in charge of the Civil Tax Section. Since January of 1959 he has been in private practice with his father, Leo H. Lowitz, in the firm of Lowitz, Vihon & Lowitz, at 100 No. La Salle Street.*

In June of 1958 the Supreme Court in the case of *Walter W. Flora v. United States of America*[1] affirmed the government's position that a taxpayer (be he an individual or a corporation) cannot sue for an income tax refund without first paying the full tax. On its face the opinion appears clear cut, but certain questions arise when one considers the extent of its application.

When the Internal Revenue Service concludes that a taxpayer has understated his liability for income, estate or gift taxes, a deficiency is determined.[2] With the exception of Jeopardy Assessment situations,[3] which permit immediate assessment and collection of a deficiency, the Internal Revenue Service must give the taxpayer notice of the deficiency determination prior to actual assessment.[4] Upon receipt of such notice, the taxpayer can petition the Tax Court to review the deficiency.[5] If the taxpayer does not go to the Tax Court, the deficiency is assessed[6] and collection procedure may follow. Once an assessment is made, the taxpayer's recourse is to pay the tax and follow the refund requirements of the law. These are to file a claim for refund with the Internal Revenue Service, and after disallowance or the lapse of six months without any Internal Revenue Service action to institute a suit for refund[7] in the United States District Court or the Court of Claims.

The Flora case deals with the question of whether payment of the full tax is a prerequisite to a refund suit. The Supreme Court granted certiorari because of the conflict between the *Flora* case and the 8th Circuit decision in *Bushmaier v. United States.*[8] A deficiency assessment was made against Walter Flora for income taxes for the year 1950. On the assessment of $28,908.60 Flora made two payments totaling $5,058.54. After his claim for refund was disallowed, Flora sued in the District Court pursuant



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to Section 1346(a)(1) of the Judicial Code.[9] This section provides as follows:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> (1) Any civil action against the United States for the recovery of any internal-revenue *tax* alleged to have been erroneously or illegally assessed or collected, or any *penalty* claimed to have been collected without authority or any *sum* alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

The District Court held Flora could not maintain the action because he had not paid the full deficiency. However, since that question had not previously been decided by the 10th Circuit, the court proceeded to the merits of the case and entered judgment for the government. The Court of Appeals for the 10th Circuit vacated the judgment and remanded with instructions that the complaint be dismissed for failure to state a claim because the plaintiff had not paid the full assessment for the period in question.

The Supreme Court decision, which was written by Chief Justice Warren, carefully examines the legislative history of 28 USC 1346(a)(1), its predecessors and the related internal-revenue provisions. The Court concludes that the legislative intent has always been to require full payment of an assessesd tax as a condition precedent to a refund suit. The inclusion of the clause, ". . . or any *sum* alleged to have been

excessive or in any manner wrongfully collected under the internal revenue laws . . ." (emphasis added) in Section 1346 (a) (1)[10] is held not to have changed the full payment requirement.

This decision also points out that the Board of Tax Appeals, now the Tax Court, was created to permit appeal from a tax deficiency determination prior to assessment. The Congressional Committee reports when the Board of Tax Appeals was created, clearly indicate that Congress understood that refund suits could be maintained only after full payment of the assessment.

The Supreme Court holds the statutes involved do not alter the principle set forth in *Cheatham v. United States*[11] that one must pay first and then litigate his liability for the tax. This position is held to be supported by the statutory provision prohibiting suits to restrain the assessment or collection of taxes,[12] and the exclusion of controversies dealing with Federal taxes from the Federal Declaratory Judgments Act.[13]

In conclusion the Court states:

> It is suggested that a part-payment remedy is necessary for the benefit of a taxpayer too poor to pay the full amount of the tax. Such an individual is free to litigate in the Tax Court without any advance payment. Where the time to petition the court has expired, or where for some other reason a suit in the District Court seems more desirable, the requirement of full payment may in some instances work a hardship. But since any hardship would grow out of an opinion whose effect Congress in successive statutory revisions has made no attempt to alter, if any amelioration is required it is now a matter for Congress, not this Court.[14]

Legislation establishing a part payment refund remedy, if proposed, would surely meet with strong opposition from the Internal Revenue Service. Permitting refund suits after partial payment of the tax assessment would benefit many taxpayers. Such a law would be open to wide abuse and would probably seriously impair the government's ability to collect taxes. Many taxpayers, without legitimate grounds for contesting an assessment, would make a token payment and sue for refund, hoping at least to reduce the amount they would ultimately have to pay. In jurisdictions where the District Court is considered to be a "taxpayer's court" most taxpayers would use that forum instead of the Tax Court. Conceivably such legislation could cause the chaotic tax collection situations which exist in some European countries, since there would be strong impetus to a policy of paying a little and trying to settle the balance. With the availability of the Tax Court it seems unlikely that any part payment legislation will be enacted.

Of more importance are the possible ramifications of the *Flora* decision. There have been a number of recent cases following the *Flora* principle.[15] In these cases the Courts have followed the ruling that refund suits cannot be maintained unless the full tax has been paid. One question that comes to mind is what is meant by full payment of the deficiency assessment. Often a deficiency assessment against a taxpayer will be made for a number of taxable years. That is, in one procedural act of assessing, the government will set up a deficiency in taxes for more than one year. Does the *Flora* decision mean that the liability for the multiple years must be paid before a refund suit can be properly maintained? Probably not! Although in one act of assessing, liability may be created for a number of taxable years, each year should be considered a separate taxable entity and a complete assessment in itself. Thus where a taxpayer is assessed for more than one year he should be able to pay the *full* liability for one of the years and sue for a refund for that year. Of course if the issues for the other years' liabilities are the same, the decision for the year sued upon would control the other years as well, and should have an effect on the government's collection efforts for the other years.[16] It seems unlikely that the Internal Revenue Service will contend that with an assessment for multiple years the tax for all years must be paid before suit can be instituted. Moreover, it is very doubtful that the Courts would adopt such a view or so interpret the *Flora* decision.[17]

On occasion a taxpayer will file a return, make a part payment, and after filing a claim, sue for a refund. When a return is filed an assessment is made of the liability one sets up on the return.[18] The taxpayer is credited for that portion of the assessment he has paid. The balance is held to be due the government and collection is attempted. This situation usually arises when a taxpayer differs with the Internal Revenue Service position on certain substantive issues. He files his return in accordance with the government's position, makes a part payment and tries to contest the issue in the District Court rather than the Tax Court. Under the *Flora* rationale a part payment taxpayer would not be permitted to sue for a refund since he has not paid the full tax due. It would be better for such a taxpayer to report the tax according to his view of the law and let the government assert a deficiency. Then the taxpayer can avail himself of the Tax Court and get a decision without first making full payment.

Although the *Flora* decision deals specifically with income tax, it may well have an effect on suits for refund of excise taxes. This has been discussed in the case of *Jones v Fox*,[19] where the *Flora* decision was distinguished. Jones instituted suit to recover an amount paid in partial satisfaction of a cabaret tax assessment. The District Director counter-claimed for the balance due on the assessment and the United States intervened. In addition

Jones claimed a set-off or credit for a deduction on his income tax of the amount of any excise tax liability.

The Maryland District Court distinguished the *Flora* case and held there was jurisdiction over a refund suit based on partial payment. It was further decided that Jones was liable for the cabaret tax and that he could not deduct the liability in computing his income tax for the year in which the excise tax liability was incurred. The Court said:

The Flora case dealt with a deficiency in income tax. The instant case deals with a deficiency assessment of excise taxes. Without elaborating upon what has already been said in this opinion regarding the lack of jurisdiction in the Tax Court over excise taxes with concomitant hardship to the taxpayer and the absence of alternative remedies, such as the Supreme Court indicated would be present in the case of suit for recovery of income tax, it is necessary to reexamine the divisible nature of the excise tax.[20]

It goes on to hold that an excise tax assessment is divisible into separate transactions which make up the total assessment. Thus the payment of the tax on one day's receipts or even the receipts from one patron constitutes a complete taxable item subject to a refund suit.

Although there is much logic in the "divisible nature" theory of excise taxation, the government may refuse to follow the *Jones* decision. Had the government not won on the merits involved, the jurisdictional question would probably have been appealed. Reliance on the *Flora* principle could require a taxpayer to pay the full excise tax assessment before suing for a refund. Generally this would be the tax due for a quarterly period, even though several quarters' liability might be assessed at one time.[21] Of course a taxpayer can argue that such a requirement is harsh because there is no Tax Court jurisdiction over excise taxes. But there is a full right to administrative appeal from an excise tax determination,[22] and under the established theory of "pay first and litigate later" this may be held to be adequate.[23]

In all likelihood as soon as the opportunity presents itself the government will attempt to get a definitive decision on the applicability of the *Flora* case to excise tax situations.

It would seem from the *Flora* decision that the impropriety of refund suits after only part payment should have been clear cut, and as the Court said:

. . . "there doesn't appear to be a single case before 1940 in which a taxpayer attempted a suit for refund of income taxes without paying the full amount the Government alleged to be due.[24]

Taxation being an ever increasing burden, it is only logical that the question did arise and did require definitive judicial decision. Whether the *Flora* decision absolutely settles the issue remains to be seen. Clearly, based on this decision, the Internal Revenue Service will more strongly adhere to the position that refund suits cannot be brought without the taxpayer first paying the full amount of the liability determined by the government.

Footnotes

[1] 357 U.S. 63; 78 S. Ct. 1079; 1 AFTR 1925*
[2] Sec. 6211 Internal Revenue Code of 1954; 26 USC 6211
[3] Sec. 6861 Internal Revenue Code 1954; 26 USC 6861
[4] Sec. 6212 Internal Revenue Code 1954; 26 USC 6212
[5] Sec. 6213 Internal Revenue Code 1954; 26 USC 6213
[6] Sec. 6213(c) Internal Revenue Code 1954; 26 USC 6213 (c)
[7] Secs. 6511, 6532 and 7422 Internal Revenue Code 1954; 26 USC 6511, 6532 and 7422
[8] 230 F 2d, 146, 49 AFTR 208, (CA8)
[9] 28 USC 1346 (a) (1)
[10] See full text on page 10.
[11] 92 U. S. 85
[12] Sec. 7421 Internal Revenue Code 1954, 26 USC 7421
[13] 28 USC 2201
[14] 357 U. S. 63, page 75
[15] *Baker v. Tomlinson*, 2 AFTR 2d 5195 (D. C. Fla.)
Conway v. U. S., 2 AFTR 2d 6117 (D. C. Mass.)
Holt v. U. S., 2 AFTR 2d 5711 (D. C. Ky.)
King v. Williams, 2 AFTR 2d 6248 (D. C. Ohio)
In addition there have been a number of unreported decisions based on the *Flora* rationale.
[16] Where there are no different issues involved and the taxpayer prevails as to one year's liability, the Internal Revenue Service will normally abate the assessments for the other years.
[17] In none of the cases cited in note 15, *supra*, did it appear that the full tax had been paid for any one of the years assessed.
[18] Sec. 6201(a) (1) Internal Revenue Code 1954; 26 USC 6201(a) (1)
[19] 162 Fed. Supp. 449 (D. C. Md.)
[20] 162 Fed. Supp. 449, p. 468.
[21] This would be based on the same view that considers that each year gives rise to a complete tax for income tax purposes.
[22] Moreover the Tax Court is an aid created by Congress to correct the "pay first" hardship in income, estate and gift taxation. Presumably Congress could have (and maybe should have) given the Tax Court jurisdiction over excise tax matters.
[23] It should be noted that the use of the administrative remedies in excise tax matters does not necessarily result in a stay of collection of the assessment, which places an added hardship on the taxpayer.
[24] 375 U. S. 63, page 69.
*AFTR denotes American Federal Tax Reports

SPECIAL GROUP DISABILITY PLAN

Parker, Aleshire & Company has recently addressed to our membership an anniversary enrollment invitation for the Special Group Disability Plan which it has been administering for our Society since 1957. The last enrollment was held during the month of March.

Parker, Aleshire & Company has for years successfully administered this plan for the Chicago and Illinois Bar Associations.

A large number of our members have already availed themselves of this Loss of Time Protection Plan, and many are long standing policy-holders.

The office of Parker, Aleshire & Company, established in 1901, is 175 W. Jackson Blvd., Chicago 4.

LEGAL EDUCATION COMMITTEE COMPLETES AUSPICIOUS PROGRAM

As this issue of the Journal goes to press, the Legal Education Committee of the Society, under the chairmanship of Elmer Gertz, has completed the most successful program in the history of the Society. The speakers were all good and the attendance, while it fluctuated considerably, was never bad. Many of the sessions resulted in over-flows. This was all the more remarkable in view of the fact that only one general announcement and two cards were sent out for the entire series. The series was attended by many non-members and has resulted in new memberships and prospects which will be worked on.

When Louis Ancel, who was to speak on the new zoning ordinances, took sick, his associate, Jack Siegel, gave a brilliant talk on municipal law aspects of the enforcement of civil rights. His talk is expected to be the subject of an article by the lecturer himself in an issue of The Decalogue Journal. Other lectures will likewise be the subjects of articles in our Journal. The piece by Harry Busch on the new jury rules aroused much interest and press comment.

It is still possible that the present series will be supplemented by a few additional talks. The chief concern of Legal Education Chairman Elmer Gertz is to learn the reactions of the members to the series with the view to profiting in next year's series. Members are asked to write to him to express their views. He wants to know which talks were especially valuable, which least valuable; who should be asked to speak next season and on what subjects; is 1:00 P.M. a good time to begin each talk; should there be more or less time for questions; should there be more or fewer lectures; should there be a separate series in the fall and one in the winter and spring; should there be more extensive treatment of particular subjects; how can attendance be sustained; should there be talks slanted for the younger lawyers and others for the older practitioners. Write whatever is on your mind and send it to Elmer Gertz at Suite 1351, 120 S. La Salle Street, Chicago 3. Finally, advise him if you would like to serve on the Legal Education Committee and to engage in the work of planning.

CONGRATULATIONS!

The following members of our Society were winners in the last aldermanic election on February 24th:

Leon M. Despres — 5th ward
Thomas Rosenberg—44th ward.
Philip A. Shapiro — 39th ward
Seymour F. Simon — 40th ward.

A run-off election on April 7th between members Maurice Perlin and Jack I. Sperling will determine the successful candidate for alderman of the 50th ward.

Applications for Membership

REGINALD J. HOLZER, *chairman*
FAVIL DAVID BERNS, *co-chairman*

APPLICANTS	*SPONSORS*
Morton Abt	Meyer Weinberg Oscar Nudelman
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Irving R. Golden	Julius L. Sherwin Benjamin Weintroub
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Marshall Kaplan	Edward Kaplan Reginald J. Holzer
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Alan Masters	Harry D. Cohen David L. Gomberg
Joseph Planer	Meyer Weinberg Jack E. Dwork
Edwin M. Raffel	Meyer Weinberg Philip H. Mitchel
Thomas Rosenberg	Benjamin Weintroub Harry A. Iseberg
Albert Siegel	Herbert A. Glieberman Meyer Weinberg
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Joel Jay Sprayregen	David R. Mandell Marshall Patner
Richard S. Weinstein	Benjamin Weintroub Irwin A. Goodman

MEMORIAL FOR WARSAW GHETTO

Chicago Jewry will observe the Sixteenth Anniversary of the Warsaw Ghetto uprising on Sunday, April 19, 8:00 P.M. at the Sherman Hotel. Featured speakers will be Rabbi Charles Shulman of Riverdale Temple, New York, and Jacob Pat, National Executive Secretary of Jewish Labor Committee. Dramatic narrative and appropriate music will be offered by noted artists.

The Memorial Service is sponored by the Chicago Yiskor Committee for Six Million Martyrs formed two years ago through the initiative of the American Jewish Congress. The committee consists of 43 Jewish organizations in Chicago, including The Decalogue Society of Lawyers. Milton J. Silberman is chairman of this event.

Past president Paul G. Annes is president of the Chicago chapter of the American Jewish Congress.

STOCK PURCHASE PLANS AND THE ACCUMULATED EARNING TAX

By THEODORE BERGER

Member Theodore Berger is a graduate of Northwestern and New York universities, and an editor of THE JOURNAL OF TAXATION. *He has contributed articles to* THE TAXES MAGAZINE, *and* THE TAX LAW REVIEW.

Most closely held corporations find some plan for stock purchase essential. In the relatively simple case two persons may own the stock of the corporation equally. Perhaps they had originally conducted the business as partners before incorporation. Now each wants some assurance that if he is the survivor he will be able to continue the business without the intervention of strangers who may acquire the deceased stockholder's interest, and that if he is not, his heirs will receive fair value for his stock interest.

An agreement designed to meet these requirements might provide for (1) restrictions on the transfer of stock during the lifetime of both, (2) purchase of the deceased's shares from his estate at a price fixed by formula embodied in the agreement or by arbitration, (3) financing of this obligation through insurance or otherwise. The agreement might be expanded to provide also for purchase of stock upon the individual's retirement. Whether the obligations are assumed by the corporation or the individual stockholders, whether the purchase of the decedent's stock is mandatory or optional, whether the obligations should be funded—these are questions which go to the fundamentals of the agreement and may be determinative of the tax problems which arise.[1]

A series of cases[2] decided in the last year or so has focused the attention of tax advisors on these stock purchase agreements. While these cases have in general involved unusual fact situations, they have caused a re-examination of the tax aspects of the more typical agreement. The fact that a stock purchase agreement benefits both the stockholders as individuals and the corporation as a separate entity has given rise to these tax controversies. The advantage to each stockholder is primarily to insure a market for his shares. The advantage to the corporation is that the agreement tends to stabilize its business by assuring some continuity.[3]

This article will focus on only one point of conflict: the effect for purposes of section 531 of accumulating earnings to meet the corporate obligation to purchase stock under the agreement. Section

THEODORE BERGER

531 imposes a penalty tax on corporations accumulating surplus for the purpose of avoiding the individual income tax which would be paid by their shareholders if the surplus were to be paid out as dividends. This penalty is invoked if the corporation is not able to show a reasonable business need for the accumulation. That is, an accumulation beyond the reasonable needs of the corporate business is *prima facie* evidence of a purpose to avoid the tax to the shareholders associated with the payment of dividends.[4]

Financing a Redemption

Before considering the legal question of whether an accumulation of a corporation to meet its obligation under a stock purchase agreement constitutes such a reasonable business need, it is worthwhile to examine the arithmetic of the situation. Although there is little correlation between book values and market values of listed stocks, it is likely that most stockholder agreements which fix a price for the stock relate that price to book value. If the price is to be set by arbitration, the arbitrators will give great weight to book value in setting the value of a closely-held stock. As a result, the corporate obligation under an agreement requiring it to buy the stock of a deceased or retiring stockholder is almost certain to require, at any time,

most of the surplus available for distribution. The government's position, of course, is that the corporation could reduce the redemption price *pro tanto* by distributing earnings as a dividend. But even so, the corporation would have to retain sufficient liquid funds to continue business operations after the redemption. The liquid funds could be made available through insurance on the lives of both stockholders, but the payment of premiums—which are, of course, nondeductible[5]—would itself represent a substantial accumulation of surplus.[6]

Another answer is for the agreement to require purchase of the decedent's stock by the surviving stockholder, rather than by the corporation. This arrangement serves the essential purposes just as well as redemption by the corporation, but raises vexing financing problems. Each stockholder would have to maintain substantial liquid funds to stand ready to buy out the others' shares. Sharply progressive tax rates make it difficult to accumulate such funds. Cross-purchase of life insurance again is a possible solution, but unwieldy where more than a few stockholders are involved.

Reasonable Business Needs

Thus, we have seen that a closely-held corporation and its stockholders find it expedient to have an agreement controlling the disposition of stock, and that it is usually more feasible for any stock purchases required by the agreement to be made by the corporation rather than by shareholders. Yet the accumulation of surplus required for such purchases is so great that, if this were to be considered a reasonable business need of the corporation, the penalty surtax on unreasonable accumulation could almost indefinitely be avoided.

The admitted advantages to the corporation in a stock purchase plan cannot justify the extreme position that accumulation for this purpose is *ipso facto* a business need of the corporation sufficient to avoid the penalty tax. A balancing of interests is called for. Almost any accumulation of surplus can be justified to some extent as strengthening the corporate balance sheet for credit purposes. But to prevent the application of the penalty tax, the need for the accumulation should, it seems, be more direct.

In *Gazette Publishing Co. v. Self*,[7] for example, the threat to harmonious management was real and immediate. Use of surplus to preserve harmony by buying out a dissident minority may well have been appropriate to corporate survival. Similarly, attorney fees for negotiating with dissenting shareholders,[8] although the outcome of the negotiations was purchase of their shares, have been held deductible as ordinary and necessary business expenses.

Insurance salesmen have invoked the *Emeloid*[9] decision to show that insurance funding of these agreements is acceptable taxwise. The precise point there at issue was whether amounts borrowed to purchase single premium insurance on the lives of principal officer-stockholders was includable as borrowed capital in computing the excess profits credit. In a later year the corporation agreed to purchase the stock of the first to die with the proceeds of the insurance, but the corporation was not so bound during the taxable year under review. The Third Circuit reversed the Tax Court's determination that the borrowing served no business purpose, only the personal advantage of the insured stockholders. The appeals court stressed the importance of harmonious management to the business success of the corporation. The insurance, it pointed out, would promote continuity of management free from the harrassments of outside interests.

Even if one agrees with the *Emeloid* holding, the risk of extending the principle to the accumulated earnings tax situation is apparent. The statutory provision tested in *Emeloid* probably is designed to exclude from invested capital for excess profits tax purpose only those borrowings having no legitimate connection with the business. It is a more lenient standard than the "reasonable needs of the business" for which earnings must be accumulated to avoid the penalty tax. The latter implies that the business purposes of any surplus retention must clearly predominate.

Nor is there much comfort for taxpayers in this field in the recent appellate decisions refusing to tax as a dividend to the shareholders insurance premiums paid by the corporation to fund a stock purchase agreement.[10] These decisions recognize that such agreements bring benefits both to the corporation and the stockholders, but hold that the acquisition of insurance by the corporation is not such a direct benefit to the stockholders as to constitute a taxable dividend at that time. There is nothing to suggest that the surplus retention represented by the insurance is for reasonable business needs in the sense of the penalty tax provisions.

The Tax Court has apparently adopted the position advanced by the Commissioner of Internal Revenue that the use of surplus for a planned redemption of stock shows the accumulation was for the proscribed purpose of avoiding surtax, that is, the revealed purpose is to draw out the earnings at capital gains rates by the redemption.[11] In a recent memorandum decision,[12] the penalty tax was not applied where the shares of one 50% stockholder were redeemed after a dispute with the other. The opinion stresses the suddenness of the dispute and concludes that "the decision to have the corporation

buy the shares . . . was not the result of some long-term planning or a desire to distribute earnings [to retiring stockholder] at capital gains rates. . . ." It logically follows that the imposition of the penalty tax does not have to await the redemption. The existence of the agreement at any time shows that the surplus is being held for eventual distribution as capital gains.

1954 Code Changes

Two provisions added by the 1954 Code, the impact of which has not yet been fully tested, may affect our thinking on this problem. The first, section 535(c)(1), in effect imposes the penalty tax only on that portion of the current year's earnings not retained for the reasonable needs of the business. Section 102 of the 1939 Code imposed the tax on the entire net income if the surtax avoidance purpose was found to exist.

The other provision, section 534, permits the taxpayer to shift to the Commissioner the burden of proof with respect to the allegation "that all or any part of the earnings and profits have been permitted to accumulate beyond the reasonable needs of the business" when the notice of deficiency is based on this allegation. It is submitted that in every case involving 1954 or a later year, section 534 could be applied by the taxpayer because the imposition of the tax necessarily alleges that some portion of net income was not retained for reasonable business needs.

Perhaps in the context of these provisions a taxpayer may make a better justification than previously of its policy of surplus accumulation for stock redemption. The corporation can point to the admitted advantages to its own business stability in such agreement. While this "corporate purpose" is coupled with a "stockholder purpose" to consolidate control in certain persons and to provide a market for the shares, it might be possible to weigh the relative importance of the two in a given set of circumstances.[13] That is, a trier of fact might find, with respect to an insurance funded redemption agreement, that a certain percentage of the premiums could be allocated to the corporate purpose; this portion would be part of the accumulated earnings credit as having been retained for the reasonable needs of the business. If the burden of proof is shifted to the Commissioner under section 534, taxpayers may have a real tactical advantage.

Section 303

A further word should be added on the possible effect of 1954 Code, section 303. This section continued and expanded the principle that the redemption of stock of a closely-held corporation should not be taxed as a dividend to the extent the proceeds of the redemption are used to pay death taxes, funeral and administration expenses of the deceased shareholder. The purpose of this provision supposedly was to preserve family businesses and stay the trend toward mergers and combinations by making it possible for the family to get liquid funds for the estate from the business itself.[14] It holds forth the implied promise that this is the tax-accepted way of preserving family control. If section 303 represents a considered social policy of Congress, it would seem wrong, or at least unfair, for the Internal Revenue Service to penalize an accumulation of surplus to meet this redemption.[15] Yet the answer of the revenue authorities would doubtless be that the stock value, and hence the liquid funds needed for redemption, could have been kept down by timely dividend distributions. Again, the mathematics of the particular situation may rebut this argument.

Footnotes

1 The agreement might also be effective in fixing the estate tax valuation of the shares. See estate tax Regs. Sec. 20.2031-2(h).

2 Prunier v. Comm., 248 F. 2nd 818 (1st Cir. 1957); Sanders v. Comm., 253 F. 2d 855 (10th Cir. 1958); Zipp v. Comm., 259 F. 2d 119 (6th Cir. 1958); Holsey v. Comm., 258 F. 2d 865 (3d Cir. 1958); Pelton Steel Casting Co. v. Comm., 251 F. 2d 278 (7th Cir. 1958), cert. denied 78 S. Ct. 995.

3 For a full discussion of the advantages to the corporation, see Mannheimer and Friedman, "Stock-Retirement Agreements," 28 Taxes 423 (1950).

4 Code Sec. 533.

5 Code Sec. 264(a)(1).

6 The amount of insurance to be carried could be substantially reduced if the agreement provided that the insurance proceeds themselves would not be considered in computing book value.

7 103 F. Supp. 779 (DC Ark. 1952).

8 General Pencil Co., 3 T.C.M. 603 (1944).

9 189 F. 2d 230 (3d Cir. 1951).

10 Prunier and Sanders, *supra*, Note 2.

11 See Pelton Steel Casting Co., *supra*, Note 2; Hedberg-Freidheim Contracting Co., 15 T.C.M. 1433 (1956), aff'd, 251 F. 2d 839 (8th Cir. 1958).

12 Penn Needle Art Company, 17 T.C.M. 504 (1958).

13 As to the metaphysical difficulties in distinguishing between corporate and stockholder purposes with reference to corporate reorganizations, see Bittker, "What is 'Business Purpose' in Reorganization?," Proceedings of New York University Eighth Annual Institute on Federal Taxation 134 (1950); also, Lewis Est., 10 T.C. 1080, 1086 (1948).

14 See H. R. Rep. No. 2319, 81st Cong., 2d Sess. (1950).

15 Cf. Kimbell Milling Co., 11 T.C.M. 219 (1952).

SOCIETY HOLDS MEMORIAL SERVICES FOR JUDGE HARRY M. FISHER

Below are excerpts from addresses at memorial services for Judge Harry M. Fisher, arranged by our Society and held on January 8 at noon, at Room 909, County Building, Chicago. The following speakers participated in the proceedings honoring the memory of the late judge: Alec Weinrob, president; Augustine J. Bowe, past president of the Chicago Bar Association; David J. Hayes, vice-president of the Illinois Bar Association, and Judge Thomas E. Kluczynski, chief justice of the Circuit court of Cook County. Rabbi Ira Eisenstein, of the Anshe-Emet Temple, uttered the prayers. First vice-president, Meyer Weinberg, was chairman of the occasion.

Mr. Alec Weinrob: We are gathered here to pay tribute to the memory of a distinguished lawyer, a great judge, a founder of The Decalogue Society, and a man whose influence for good on the community, its laws, its institutions, will exist for generations to come.

Upon his arrival in the United States as a boy of ten in 1893, he quickly adapted himself to the culture, and spirit, of his new homeland. Although his formal education consisted of four grades of grammar school and night study at law school, his ability to communicate with clarity and conciseness, caused him shortly after his graduation to be in constant demand as lecturer and speaker by communal organizations.

In his nearly half-century of service as judge he labored constantly and conscientiously towards a better administration of justice. We are indebted to him for writing and seeing through the legislature of the following legislation: Revision of the Juvenile Court Act; The Pandering Act; The Adoption of Children Act; The Act Relating to Treatment of Feeble Minded Persons; The Act consolidating the State Penitentiaries and placing commitments in charge of the Department of Public Welfare; The Act creating Diagnostic Depots in the Penal Institutions. He was co-author of Uniform Judicial Review of Decisions of Administrative Agencies, Civil Practice Act, Rules of the Supreme Court, and of the Gateway Amendment. Until his passing he fought valiantly for the passage of the Judicial Article.

While his post was that of judge, he was, inherently, a teacher. He loved to expound the law, its ideals, and philosophy. Not only did lawyers ask him for explanation of various aspects of the law, but so did many judges who sought his advice and counsel.

Judge Fisher found time to help the immigrant and the poor, especially so during the early part of the century. He worked most diligently towards the creation and recognition of Israel as a State. Nor did he ever rest on his laurels. For the past decade, for instance, notwithstanding the fact that he suffered a heart attack, he was active in the Israel Bond Drives, the United Jewish Appeal, and many public and philanthropic activities.

The Decalogue Society honored him in 1952 with its Award of Merit for his outstanding contribution to society and to the law. In our hearts and minds he occupies a place second to none; for more than a generation he was our friend and teacher. In the saying of our rabbis, "Zecher Tzadik Livrocho"—"Remember the righteous as a blessing."

Mr. Augustine J. Bowe: We speak of a government of law, and not of men. Yet, essentially, the view that Harry Fisher had of law was that it was a government of men who felt for, understood their fellowmen, and dealt in a human and decent way with their problems. His sympathy was on the side of the unfortunate; he continually tried to correct an imbalance that had been placed in their lives.

Everyone of us feel that in his death, we have lost a great part of our lives. We mourn the termination of such a life and our hearts go out to those who are closest to him.

He wouldn't have wanted a memorial affair because the last thing in the world that Harry had was self pity. I remember calling on him and his wife after his attack about six years ago. He had been through quite an ordeal and although I was prepared to give him all the sympathy that I thought an invalid would want, he stopped me with these words, "I don't feel sorry for myself. I'm seventy years of age; I have never been sick a day in my life. The Lord has been very good to me. I will go on as long as I can, but, as far as what has happened, it was a great blessing that it was deferred as long as it was."

It was a great mercy that he was permitted to continue a useful, generous, helpful life to his community right to the last minute, almost, of his life. I am sure, Mrs. Fisher, that we all share the feeling of sorrow and loss which you and your family so deeply feel, and we hope that the Lord will be kind to you for your own sake and for his.

Mr. David J. Hayes: During his long and prominent career on the bench, Judge Fisher was a leader in creating a central assignment system for Circuit Court judges, which system he had charge of for twenty years. In 1956, he became motions judge for both the Circuit and Superior Courts. He was one of

the principal proponents of the Civil Practice Act of Illinois which caused the disposition of the crowded Circuit and Superior court dockets to be greatly expedited.

Throughout his long and honorable judicial career he was always careful to avoid the rigidity of adhering to fixed legal concepts. He was a man of brilliant intellect and judgment. His reasoned convictions were inescapable; always, he was patient and fairminded, ready to listen to others, but forceful in the assertion of his own position, though never extravagant. He was ever a student of the law, alive to its symmetry as a science, yet never regarding it as a mere abstraction. He had a contempt for sham and mere form.

Judge Fisher believed that his duty as a citizen was to serve the people at large and, in discharging that duty, he served all. He was an uncompromising foe of evil, sagacious in spiritual things, and had the abiding consciousness that he was fundamentally right. He had a rare maturity of judgment, unswerving loyalty to principle, and unfaltering devotion to duty. It is comforting to know that the outstanding contributions Judge Fisher has made to the Bench and Bar of Illinois are and must be truly imperishable. The members of the Illinois State Bar Association have a profound respect for the character, courage, ability and learning of Judge Fisher and unite in extending their affection and sympathy to his bereaved ones and hope that God may give them great consolation under this heavy burden.

Judge Thomas E. Kluczynski: All of forty-six years on the Bench, Judge Fisher has given of his brilliant mind, his acumen, his legal ability, his courage, *the change* to modification and liberalization of the laws and the practice of law in the courts of justice in the State of Illinois.

He is known not only in this state, but throughout the United States for his legalistic erudition. He knew of the intent behind the law as enacted and passed because he was in the halls of the legislature many times during their consideration and eventual passage.

It was through his efforts that there is a chancellor with equity powers presiding and passing upon the future and rehabilitation of children before the Juvenile court.

It was Judge Harry M. Fisher who first decided that a person could waive trial by jury in felony cases and thereby relieved the backlog in the criminal court. Harry M. Fisher caused the abolition of the procedure making jurors judges of the law as well as fact; now they are solely the judges of the facts and the judge, who is learned in law, would pass on matters of law. He handled so much of the Circuit court work that it was astounding that one man could do it within the time available. The extraordinary remedies, citations, garnishments, administrative reviews, motions, personal injury calendar were his constant concern; in addition, he would check orders of the court and put them in proper phraseology.

Judges of Cook County, judges of the State of Illinois, and all others who have had any experience with, or any happy opportunity of knowing Judge Harry M. Fisher and working with him, will always remember him in the annals of the laws and the courts of the State of Illinois, and, especially, in the Circuit Court of Cook County.

ESSAY CONTESTS AROUSING INTEREST

The Constitutional issue of the separation of Church and State looms up once more as one of the greatest importance, and it is this issue that The Decalogue Essay Contests highlights. How is one to maintain a secular government in an age when international and domestic cataclysms drive many people to find solace in varying forms of theocracy? How complete is the Constitutional provision proscribing religion in any form in the administration of the body politic? When public funds are used to transport parochial school students, is it an intrusion by religion, or is this an exception to the general rule? The contests will supply some of the answers.

Member Marshall Patner, administrative director of The Decalogue Essay Contests reports gratifying progress in the solution of the manifold problems arising out of the contests. An effort is on foot to secure broader participation in the law schools and among lawyers. Several essays have already been received, months before the termination of the contests and others are expected. The aim is to accelerate and increase participation. Special efforts are being made to enlist the aid of law review editors and deans of law schools. Speakers will be furnished for panel discussions at law schools and radio programs. It is hoped that our Society will sponsor in the near future a symposium on religion in public schools.

Mr. Patner urges as many members of the Society as possible to submit essays, as the contest is theirs as much or more than others. The judges will not be prejudiced for or against any participant by reason of his membership in the Society, except that those on the essay contest committee are not eligible. The last issue of The Journal reprinted the rules of the contest. Additional copies of the rules may be supplied on request.

ALFRED E. GALLO

Alfred E. Gallo recently elected president of the Justinian Society of Illinois is vice-president and head of the Trust department of The Cosmopolitan National Bank of Chicago.

Mr. Gallo was formerly with the Trust Department of The Chicago National Bank.

DEPORTATION CASES AND BAIL

By WILLIAM GREENHOUSE

The Immigration and Naturalization Service of the United States has recently established a general policy of refusing to release any deserting seaman and stowaways upon bail. These aliens are now detained from the time of initial arrest, through the interval of a pending hearing, until the determination of their appeals to the Board of Immigration Appeals in Washington.

The original grant of authority for detaining aliens in custody, pending determination of deportability, follows the Subversive Activities Control Act of 1950. This was intended to cover aliens hostile to the government likely to engage in activities of a subversive, criminal or illegal nature; or pursuits injurious to public welfare. In the ordinary seaman case, subversive activity is not a point at issue; nevertheless, this power of denying release on bond has been stretched and utilized to control non-subversive cases.

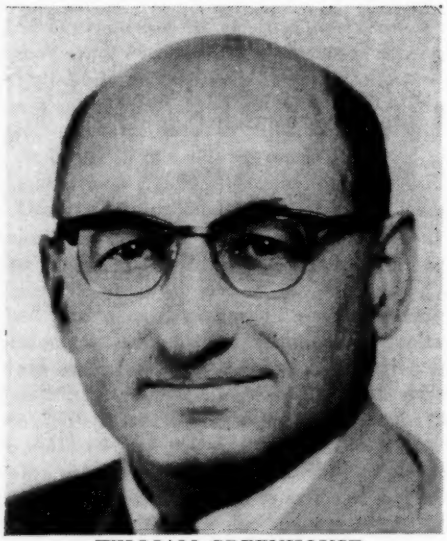
The sole purpose of detention is to have the alien available for deportation when ordered. An adequate bond, as in a criminal case, would secure his appearance. To keep him confined is additional punishment.

When an alien is arrested and taken into custody, the Immigration and Naturalization Service has the discretion to:

(a) continue to detain the alien without releasing him under bond;
(b) Release alien under a bond of not less than $500.00;
(c) release alien under conditional parole (own recognizance without bond)—(Sec. 242 (a), Immigration and Nationality Act, P. L. 414).

In an effort to discourage seamen from deserting their ships in ports of the United States, the government has adopted this rigid attitude which could conceivably work hardship in many cases and an injustice in some.

When the decision to detain the alien has been made, the alien is then served with a written statement to that effect. His sole remedy, by regulation, is to file an administrative appeal to the Board of Immigration Appeals at Washington, D. C., within five days of receipt of written decision and pay a $10.00 appeal fee. A resume of the case is then sent to Washington and there a decision is made. There is no time limit within which the Board of Immigration Appeals must rule on the appeal. During all of this time the alien remains in custody. As a statistical matter most district director findings denying bail are affirmed by the Board of Immigration Appeals. The administrative appeal is mandatory in order to comply with the requirement of exhaustion of administrative remedies prior to filing a court action.



WILLIAM GREENHOUSE

Deprived of his liberty and denied his release on bond, the alien is thus frequently handicapped in appealing to his relatives and friends for assistance and his ability to confer freely with his attorney, to prepare his case properly and conduct investigation is drastically limited.

Since aliens are anxious to avoid months of incarceration they usually do, under the circumstances, waive the right to appeal to the Board of Immigration Appeals in Washington and acquiesce in speedy deportation under the entry of order of deportation. This is the aim of the Immigration and Naturalization Service, and the desired end is thus frequently accomplished. However, this form of coercion is, I believe, in violation of our concept of fair play and due process.

Pollack and Maitland, in their *History of English Law Before the Time of Edward I*, averred, "If a man was arrested he was usually replevied or mainprised; that is to say, he was set free as soon as sureties undertook or became bound for his appearance in Court."

Glanville and Bracton, early English law scholars, declare, "If a man has appealed or was indicted of any felony other than homicide, he is usually replevied."

Article I, Section 9, of our Constitution states that the privilege of writ of habeas corpus shall not be suspended, unless in cases of rebellion or invasion, the public safety may require it.

Article VIII of the Constitution states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." It is submitted that a refusal to release on bail is at least tantamount to excessive bail and is in contravention of the Constitution.

In 18 U.S.C. 596, the Federal Statute recites that bail "Shall be admitted upon all arrests in criminal cases where the offense is not punishable by death," and, in the discretion of the courts, even where the offense is subject to a death penalty. The purpose of bail is to secure attendance of the alien at the hearing, to answer and submit to hearing and to be available for deportation. *U. S.* vs. *Foster,* 70 F. Supp., 422.

However, it has been definitely adjudicated that deportation proceedings are civil in nature and therefore civil rules of procedure and evidence are applicable. See *U. S. ex rel Bilokunsky* vs. *T O D,* 44 S. Ct. 54.

This creates the inequitable situation of retaining an alien in custody prior to a finding of deportability. In the event an order of deportation is entered and subsequently reversed, the alien has endured unnecessary imprisonment for the time elapsed from arrest until the appeal decision was rendered.

To obtain the release of an alien pending final order of deportation, relief may be sought by filing an action in the United States District Court for a writ of habeas corpus or under Section 10 of the Administrative Procedures Act, Title 5, U.S.C.A. 1009 and 1011, which is applicable to all orders under the Immigration and Nationality Act, as amended, and under general powers of a court of equity. See *Shaughnessy* vs. *Pedreiro,* 349 U. S. 48; 75 S. Ct. 591.

At this point we are confronted with the following wording of the Immigration and Nationality Act, Section 242 (a):

> Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General *is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.*

In the case of *Yaris* vs. *Casperdy,* 202 F(2d) 109, 112, the Court said:

> Section 242 (a) provides but an added statutory recognition of a basis for judicial review, not a limitation upon the power as it had existed.

The Court has an inherent power to entertain application for bail pending a decision by the Court of Appeals on an appeal dismissing a petition for habeas corpus. *Petition of Johnson,* 72 S. Ct. 1028; L. Ed. 1377.

In the case of *Yanish* vs. *Barber,* 73 S. Ct. 1105, the Court allowed the release of the alien on bail pending final order of deportation, saying:

> The function of bail pending appeal from denial of petition of Writ of Habeas Corpus is to provide security for appearance of prisoner on one hand, and to protect his right of appeal on the other.
>
> There is judicial review of his exercise of such discretion even though the attorney general has broad discretion under the Immigration and Nationality Act to detain, release on conditional parole, or release on bond.

In the case of *U. S. ex rel Belfrage* vs. *Shaughnessy,* 212 F (2d) 128, where an alien was held without bail pending a hearing on deportation charges, the Court said the District Court had power to admit an alien to bail pending a hearing on deportation charges on a clear and convincing showing that the decision to hold the alien without bond was without reasonable foundation.

In the case of *Carlisle* vs. *Landon,* 73 S. Ct. 1179, proceedings were had upon an application for bond pending appeal and the government invoked the defense under Section 242 (a), the Court said:

> The 8th Amendment provides excessive bail shall not be required . . . that means . . . a person may not be capriciously held.
>
> The discretion to hold without bail is not absolute. If it were, we would have own own model of the police state which looms on the international horizon as mankind's greatest threat. Under our constitutional system the power to hold without bail is subject to judicial review. There must be an informed reason for the detention.

In the case of *Shaughnessy vs. United States ex rel Mezei,* (1953) 343 U. S., 206, 212; 97 L. Ed. 956; 73 S. Ct. 625, the Court said:

> Aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.

And in the case of *Herzog* vs. *United States* (1955), 99 L. Ed. 349, 351; 75 S. Ct. 349, 351, the Court concluded:

> Ordinarily the right to bail is basic to our system of law.

It is important to note that most of the above cited cases involved the question of subversion as the real motivating factor which compelled the attorney general not to release the aliens on bond.

In the case of *Rubinstein* vs. *Brownell*, 206 F. (2d) 449, 74 S. Ct. 319, where the government attempted to detain an alien—not a seaman, however—and a court review was sought, the Court indicated that when an alien was not hostile to the government, or likely to engage in subversive, criminal, or reprehensible activities, no injury to the public interest was at stake, and whereas no intent to flee or hide was evidenced, the alien would be available for hearings or final order of deportation. The discretion of the attorney general to release or detain must be reasonable and not arbitrary or capricious.

Some courts, including the Court of Appeals for the Seventh United States Circuit, have followed the exact wording of Section 242 (a) of the Immigration and Nationality Act and have refused to release aliens on bond in accordance with the holding in *Yaris* vs. *Gaspardy*, 202 F. (2d) 109, cited above, and other cases, supra.

It would be interesting to have a decision on this point from the present Supreme Court since the continued practice of denying bail in deportation cases is a direct challenge to an honorable American tradition that a person should not be deprived unlawfully of life, liberty, or pursuit of happiness.

Lawyers Division 1959 Combined Jewish Appeal

Member Judge Jacob M. Braude, Circuit Court of Illinois, is the 1959 chairman of the Lawyers Division of the Combined Jewish Appeal. The fund raising dinner will be held on Wednesday evening, May 20th, at the Morrison Hotel.

The Judge bespeaks the cooperation of all members of our Society and the legal profession to make this annual event the financial success that it must and should be. Judge Braude urges the cooperation of our members and invites consultation with him and other members of his committee for ways and means to guarantee the largest attendance possible on May 20th, at the Morrison Hotel.

. . . Cardozo, a master of "the right style," once said with a bow to Polonius that in the higher legal writing he had discerned six types or methods: "the type magisterial or imperative; the type laconic or sententious; the type conversational or homely; the type refined or artificial, smelling of the lamp, verging at times upon preciosity or euphuism; the type demonstrative or persuasive; and finally the type tonsorial or agglutinative, so called from the shears and the pastepot which are its implements and emblem. . . .

From *THROUGH THESE MEN*
by John Mason Brown

BOOK REVIEWS

Voices in Court: A Treasury of the Bench, the Bar, and the Courtroom, edited by William H. Davenport. The Macmillan Co. 588 pp. $6.95.

Reviewed by DAVID F. SILVERZWEIG.

"It is the province of the lawyer," observed Lord Macmillan in a memorable lecture reprinted in this volume, "to be counsellor to persons engaged in every branch of human activity. Nothing human must be alien to him." With few exceptions, the great names in the law were men who enjoyed wide cultural interests, who understood the nature of man because they were versed in literature, history, biography, philosophy and other divisions of the humanities, and who especially enjoyed close familiarity with the literature of the law. "No lawyer is justly entitled to the honourable and conventional epithet of 'learned'," said Lord Macmillan, "if his learning is limited to the statutes and the law reports."

Voices in Court is not confined to the statutes and the law reports. The law has a rich inheritance; for those who practiced or concerned themselves with the law include some of the most illustrious names of any age. The editor of this volume of goodly proportions ranged far and wide, both in fiction and nonfiction, and brought forth a bountiful harvest of inspiring, entertaining, and profitable reading.

The book is divided into four sections: The Lawyer, The Judge, The Courtroom, and The Law. Each section contains ten or twelve selections, in some instances spanning several centuries. Here one can find essays by Montaigne and Mencken, Macaulay's incisive portrait of "Jeffreys, the Hanging Judge" and a *New Yorker* profile by Alexander Woollcott, the Trial of Sir Walter Raleigh and the Jim Wheat Murder Case, Beveridge's analysis of Marbury v. Madison and Judge Knox's reflections on the Volstead Act.

The list of "contributors" contains some of the most eminent names in law and letters; Charles Dickens, Carl Sandburg, Holmes, Cardozo, Learned Hand, John Marshall, Guy de Maupassant, to name a few. The selections include biography, history, letters, decisions, cases, trials, essays, and lectures. The practicing lawyer will find of special interest excerpts from famous trials revealing cross-examination of unusual skill. The most notable of these is the dogged cross-examination of Oscar Wilde by Sir Edward Carson, where the issue was the literary master's homosexuality.

If any lawyer suffers disappointment in some of Justice Frankfurter's opinions while a member of the Supreme Court, it is recommended that he read

"Chief Justices I Have Known," included in this volume, and sample the wit, humor, charm, and erudition which have made Felix Frankfurter one of America's great law teachers and scholars.

The good anthologist must bring to his task a sensitive and critical mind. The editor has culled from the vast resources of the law some of its choicest gems. The emphasis on literary distinction is strong. Indeed, essays by Lord Macaulay and Justice Cardozo are devoted to these very subjects—the need for the lawyer and judge to express himself in language of clarity and elegance, embellished where necessary with suitable references from literature and history. As Sir Walter Scott, himself a member of the Scottish bar, speaking through lawyer Pleydell in *Guy Mannering*, says: "These (books) are my tools of trade. A lawyer without history and literature is a mechanic, a mere working mason; if he possesses some knowledge of these he may venture to call himself an architect."

Voices in Court is a literary banquet for the lawyer and those interested in the law (and who isn't?) This book is an excellent springboard for a wider study in that vast and fertile domain called "legal literature."

INSIDE RUSSIA TODAY, by John Gunther. Harper Brothers, 550 pp. $5.95.

Reviewed by BENJAMIN WEINTROUB

This is an extraordinary interesting, and an important book. It is the work of a veteran journalist already famous for his perceptive reports on the state of the world on several continents. *Inside Russia Today*, however, transcends the bounds of conventional reportage and travel impressions of a foreign correspondent. As a result of his stay of several weeks within the borders of European Russia and among its Asiatic affiliates Gunther has been able to give the reader vastly more than a bird's eye view of Russia's political, economic, and social problems. He reports on what he saw in Soviet Russia, he supplies the reader with statistics and, in juxtaposition, there is invariably a brief and succinct flash-back based on the historical background of the phenomena explored. His are never random notes of a desultory nature.

Always it is the trained eye of a sophisticated and yet an impartial observer who went to the Soviet Union to find out and to tell the reader, within the limitations of a single volume, much about the people who number more than two hundred million, and to report on their government, philosophy, and way of life. In all this he is eminently successful; and though his canvas is large and the book is abundantly supplied with names of hundreds of cities and dozens of sketches of contemporary and earlier leaders of Russia, his main thesis—the story of modern Russia —is inescapably vivid, and intimately real. It is inevitable that the author of such a work should render judgments on the panorama under observation. This Gunther does with an uncommon comprehension of the reality that was before him and a grasp of the implications of the scenes he had witnessed.

Gunther came to Russia when Khrushchev was already in power, after the new Russian dictator's February, 1956 speech before the Twentieth Congress of the Central Committee of the Communist Party in the course of which he denounced Stalin the man and the leader, and his inhumanity, ruthlessness, and senseless disregard of the most elementary concepts of human dignity and decency. Russia, according to the then Khrushchev dictum would be de-Stalinized and would afford its citizenry certain constitutional rights.

Gunther found some evidence in the new regime of the relaxation of the rigors of former police methods and control by the government. There are today few, if any, sudden arrests at night or exiles to Siberia without even the semblance of a trial; and the citizen-worker may now travel over Russia in pursuit of a job without first obtaining permission from the state. Nevertheless, political freedom, free press, and right of assembly are conspicuously absent. Freedom of worship, though guaranteed by the Russian constitution, is also non-existent and the enforcement of that right is still a farce. De-Stalinization in its tangible effect on the daily lives of Soviet citizens is superficial, and few of the Russians dare as yet to implement in their factories, class-rooms, or offices its alleged salutary effects on their lives.

The most impressive phenomenon encountered by the Gunthers (husband and wife were companions on that trip) is Russia's concern with culture and education. Hundreds of universities have sprung up throughout the Soviet land since the Bolsheviks came into power. Dozens of technical schools and colleges exist in every city of the Union. Books are published by the millions and sold immediately to an ever-growing mass of readers. Where before, in Czarist days, illiteracy of the population among Russians stood as high as 85 per cent none exists today. Education is free, but subject to strenuous entrance examinations; the student is periodically tested for progress in his studies. The stress is on technical education — engineering, mathematics, architecture and physical science. Russia wants results from its youngsters so that factories may produce more and better products for its people. The emphasis is still on the expansion and growth of heavy industry, and the consumer is still denied an abundance of goods for personal consumption, such as shoes, clothing, etc. The housing situation is incredibly bad for the same reason: Russia concentrates on heavy machinery

—aeroplanes, tractors, and guns for the uncertain tomorrow. There is no unemployment in Russia; however; the average working week consists of forty-six hours or more.

Gunther reports in considerable detail on the composition of the Communist Party that runs the state and on the total subservience of the Soviet Union to the mandates of its rulers. He gives several penetrating pen-pictures of outstanding leaders in Sovietland and assesses their relative importance in Russia. Throughout there is blind obedience to the Marx-Lenin line, and the slightest questioning of the validity of that philosophy is reckoned with as heresy and is punished accordingly. Khrushchev, the new interpreter of Soviet dogma, is unquestionably in the saddle; and from his public utterances he may be regarded as a confirmed anti-Semite.

Gunther visited by plane and railroad the farthest removed from Moscow sections of Russia. He chatted with and interviewed hundreds of factory bosses, deans of universities, scholars, and engineers. Everywhere, he relates, he found an earnest desire for peace. All professed vehemently and long their abhorrence of war; but he learned—what, of course, is already known—of Russia's interest and progress in the manufacture of nuclear weapons; and he heard that in this field Russia may soon surpass the United States. In the manufacture of intercontinental missiles she is already far in advance of us.

Gunther is convinced that Russia does not want war now or in the immediate future. The cost of armed conflict in human lives and property damage is fantastically prohibitive and enormous. But, though powerful, Russia is frightened about the intentions of several powers—mainly the United States—and though its strangle-hold on its satellites is strong, its ties and position with them is precarious. Witness Hungary and Khrushchev's brazen disregard of world opinion in crushing the Hungarian revolution.

Inside Russia Today should be required reading for all who are interested in more than a fleeting glimpse at the northern colossus—its aims, strength, and policies. It is an objective and an informative book richly documented and never dull. The author would have us heed his suggestion that we become better acquainted with Russia and at the same time make it possible for her to learn about our freedom-loving institutions. In the light of such a possibility, he believes, peace and prospects for co-existence may be best arrived at.

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SOCIETY HONORS TO MISS FENBERG

The inter-organization award of The Decalogue Society of Lawyers for 1958 for outstanding contributions to its welfare will be bestowed upon Miss Matilda Fenberg, a member of our Board of Managers since 1948, on June 10th at The Chicago Bar Association.

Miss Fenberg has earned this distinction for her continuous and diligent participation in many of our Society's activities. She has repeatedly demonstrated her interest in its manifold program of benefit to the membership and the good of the legal profession.

Biographical Sketch

She was born in Findlay, Ohio, where upon graduation from Findlay college, she was granted a life certificate for teaching in Ohio state high schools. She is a graduate of the University of Chicago and has studied law at Columbia and Yale universities, where she was the first woman to matriculate. She was admitted to the Bar in Ohio in 1922; Illinois, 1923; District Federal Court 1932; United States Supreme Court, 1937. Miss Fenberg was Assistant Corporation counsel, City of Chicago, from 1929 to 1932. Hearing officer for the state of Illinois Civil Service Commission, 1942-8 and again in 1950-52. Technical adviser to the Illinois Commerce Commission, 1953. A protege of Clarence Darrow she began practicing criminal law while an office associate of this famous lawyer. An article by Miss Fenberg on Clarence Darrow is scheduled for publication in the April 1959 issue of the *Readers Digest.*

She is the author of *Women's Jurors and Jury Service in Illinois* and, of *Women Blame Coke and Blackstone,* and the author of several articles on equal rights for women.

MISS MATILDA FENBERG

Member of the National Association of Women Lawyers she has drafted the original *UNIFORM DIVORCE BILL.*

She is a member of the Chicago, Illinois, National Association of Women Lawyers, Woman's Bar Association of Illinois and American Bar associations. She is active in all of these bar groups, and chairman of several of its important committees.

She is chairman of The Decalogue Society of Lawyers Legal aid committee and a member of our Civic affairs, and Legislation committees and a contributor to The Decalogue Journal.

Her law office is at 209 So. La Salle Street.